

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT
3

4
5 August Term, 2004
6

7 (Argued: February 3, 2005 Decided: June 8, 2005)
8

9 Docket No. 03-2645
10

11 - - - - - x

12 ROBERT C. WALKER,

13
14 Petitioner-Appellant,

15
16 v.

17
18 ROY A. GIRDICH, Superintendent of
19 Franklin Correctional Facility,

20
21 Respondent-Appellee.

22 - - - - - x
23

24 Before: JACOBS and CALABRESI, Circuit Judges, and RAKOFF,¹
25 District Judge.
26

27 Robert C. Walker appeals from a judgment of the United
28 States District Court for the Eastern District of New York
29 (Weinstein, J.) rejecting Walker's Batson challenge to the
30 alleged exclusion of African-Americans from the jury in his
31 state trial and denying on that basis Walker's petition for
32 a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

33 Although the record is insufficient to determine whether

¹ The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

1 Walker established a prima facie case of discrimination, the
2 judgment is reversed because the prosecutor's stated reason
3 for exercising her thirteenth peremptory challenge against
4 an African-American potential juror was not race-neutral.

5 MONICA R. JACOBSON, Alvy &
6 Jacobson, New York, NY for
7 Petitioner-Appellant.
8

9 THOMAS M. ROSS, Assistant
10 District Attorney (Charles
11 Hynes, District Attorney for
12 Kings County, Leonard Joblove,
13 Anthea H. Bruffee, Assistant
14 District Attorneys, on the
15 brief), Brooklyn, NY for
16 Respondent-Appellee.
17

18 DENNIS JACOBS, Circuit Judge:

19 Petitioner-Appellant Robert C. Walker appeals from a
20 judgment of the United States District Court for the Eastern
21 District of New York (Weinstein, J.), rejecting Walker's
22 Batson challenge to the alleged exclusion of African-
23 Americans from the jury in his state trial and denying on
24 that basis Walker's petition for habeas relief pursuant to
25 28 U.S.C. § 2254. A Batson motion is assessed in three
26 steps: (1) Has the movant made a prima facie case that the
27 right of peremptory challenge has been exercised in a
28 discriminatory manner? (2) Has the party exercising the

1 challenge given a race-neutral reason for it? (3) Has the
2 movant established "purposeful discrimination"? Batson v.
3 Kentucky, 476 U.S. 79, 96-98 (1986). Here, there is an
4 insufficient record to show whether Walker, an African-
5 American, established a prima facie case of discrimination.
6 However, the prosecutor's stated reason for exercising her
7 thirteenth peremptory challenge against a potential African-
8 American juror was not race-neutral. We therefore reverse
9 the district court's denial of habeas relief and remand to
10 the district court with instructions to grant a writ of
11 habeas corpus directing Walker's release from custody unless
12 Walker is retried in state court within 90 days of the date
13 of the writ.

14 I

15 Walker was indicted in Kings County on charges relating
16 to the sale of controlled substances. During the fourth
17 round of jury selection before Justice Louis J. Marrero,
18 after the prosecutor struck an African-American juror on the
19 prosecutor's thirteenth peremptory challenge, defense
20 counsel raised her first Batson objection:

21 Your Honor, at this time I am making a Batson
22 challenge. I believe that the People have
23 exercised at this point -- that was their

1 thirteenth perempt. Of the thirteenth [sic]
2 perempts, twelve have been Black. This has been a
3 very racially mixed panel. I believe the People
4 are exercising their challenge in a racially
5 discriminatory manner. Twelve of the thirteen
6 challenges have been Black. One has been
7 White

8
9 In response, the prosecutor argued (and the trial
10 judge observed) that five of the nine seated jurors were
11 African-American. On that ground, the court concluded that
12 defense counsel could not establish a discriminatory
13 "pattern." However, since the prospective juror in
14 question, Bernard Jones, was still available to be seated
15 (unlike those stricken in the previous jury selection
16 rounds), the court invited the prosecutor to state her
17 objection "[j]ust for the record." In response, the
18 prosecutor observed that Mr. Jones "had a problem with every
19 single question that was asked," "gave one word answers,"
20 and was concerned about missing work, but focused upon Mr.
21 Jones's race in framing her "main . . . problem" with his
22 service:

23 *Okay, one of the main things I had a problem with*
24 *was that this is an individual who was a Black man*
25 *with no kids and no family. He said he was not*
26 *married. He had no family and in fact he had*
27 *absolutely no experience whatsoever with police*
28 *officers. He also stated after one of the*

1 questions was raised about whether or not -- I
2 believe it was if we proved our case, he goes,
3 yeah, well only if it is convincing. That is what
4 he had stated. I also noted, and you could look
5 at my notes which were not written at any time
6 after we withdrew this juror, was felt he had an
7 attitude An attitude against a prosecutor
8 is certainly a basis to remove that person.

9
10 (emphasis added).

11 The trial court ruled that defendant had not
12 established a prima facie case of discrimination as required
13 by Batson:

14 I don't find that there is a pattern I
15 have been watching it carefully and I don't get
16 the sense and I have been listening to the
17 questions and I have been listening to the answers
18 and based upon that I get the sense, I have a
19 sense of why they challenged some people; and I
20 don't believe it is on a racial basis. So your
21 application is denied. I don't think there is a
22 prima facie showing.

23 In rejecting a renewed Batson application by the
24 defense, the trial judge noted for the record that during
25 the fourth round of jury selection, the prosecutor
26 challenged two African-Americans and two non-African-
27 Americans. At the end of the fourth round, twelve jurors
28 and three alternate jurors were selected--the third
29 alternate juror, selected by consent, was Mr. Jones.²

² Mr. Jones did not deliberate.

Following trial, the jury convicted Walker of various charges and the court sentenced Walker to concurrent terms of imprisonment of six to twelve years on each count. The Appellate Division affirmed the conviction, concluding that Walker's Batson claim was "without merit." People v. Walker, 276 A.D.2d 651, 652, 714 N.Y.S.2d 515 (2d Dep't 2000). The New York Court of Appeals denied leave to appeal. People v. Walker, 95 N.Y.2d 970, 722 N.Y.S.2d 488 (2000).

Walker sought habeas relief in March 2001, arguing, inter alia, that the trial court's determination that defendant failed to establish a prima facie case of discrimination was contrary to or an unreasonable application of clearly established Supreme Court precedent. The district court concluded that habeas relief on Walker's Batson claim was "not warranted," but nevertheless granted a certificate of appealability on that issue.

II

"We review the district court's factual determinations for clear error and its denial of the writ de novo." DeBerry v. Portuondo, 403 F.3d 57, 66 (2d Cir. 2005) (citing Jenkins v. Artuz, 294 F.3d 284, 290 (2d Cir. 2002)). Under

1 28 U.S.C. 2254(d), a habeas court may grant the writ "with
2 respect to any claim that was adjudicated on the merits in
3 State court" only if "the adjudication of the claim":

4 (1) resulted in a decision that was contrary to,
5 or involved an unreasonable application of,
6 clearly established Federal law, as determined by
7 the Supreme Court of the United States; or
8

9 (2) resulted in a decision that was based on an
10 unreasonable determination of the facts in light
11 of the evidence presented in the State court
12 proceeding.

13 DeBerry, 403 F.3d at 66 (quoting 28 U.S.C. § 2254(d)).

14 Citing Batson and its progeny, Walker argues that the trial
15 court unreasonably applied clearly established Supreme Court
16 precedent in ruling that Walker failed to establish a prima
17 facie case of discrimination.

18 Batson established that "the Equal Protection Clause
19 forbids the prosecutor to challenge potential jurors solely
20 on account of their race or on the assumption that black
21 jurors as a group will be unable impartially to consider the
22 State's case against a black defendant," and prescribed a
23 three-part test for whether the prosecution exercised its
24 peremptory challenge in a racially biased manner: (1) the
25 defendant must make a prima facie case that the prosecution

1 exercised its peremptory challenge in a discriminatory
2 manner; (2) once the defendant establishes its prima facie
3 case, the prosecution must assert a race-neutral reason for
4 the challenge; and (3) the trial court must then determine
5 whether the defendant has established "purposeful
6 discrimination." 476 U.S. at 96-98.

7 The record is insufficient to determine whether the
8 prosecutor's use of twelve of her thirteen peremptory
9 challenges against African-Americans in a trial of an
10 African-American is sufficient to create a prima facie case.
11 Batson, 476 U.S. at 96. We are at a disadvantage because we
12 cannot tell the racial composition of the venire,
13 notwithstanding that defense counsel described the panel as
14 "very racially mixed." Nevertheless, under Batson and its
15 progeny, striking even a single juror for a discriminatory
16 purpose is unconstitutional³; so the Batson objection to the

³See Batson, 476 U.S. at 95 ("[A] consistent pattern of official racial discrimination is not a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions.") (internal quotation marks omitted); see also United States v. Vasquez-Lopez, 22 F.3d 900, 902 (9th Cir. 1994) ("To establish a prima facie case, [the habeas petitioner] did not need to show that the prosecution had engaged in a pattern of discriminatory strikes against more than one prospective juror. We have held that the

1 striking of Bernard Jones is a valid one. Cf. Hernandez v.
2 New York, 500 U.S. 352, 359 (1991).

3 It is helpful in a Batson case to have a record as to
4 the composition of the venire and the race and ethnicity of
5 jurors struck on either side. Moreover the allocation of
6 the burden for creating a record as to the prima facie case
7 is unsettled; so it would be prudent for counsel to preserve
8 a full opportunity for appeal by making a record for appeal.

9 However, we need not decide the allocation of burden in
10 this case because the explanation offered by the prosecutor
11 for her challenge of the individual juror was not race
12 neutral:

13 [H]e had a problem with every single question that
14 was asked. He gave one word answers
15 Okay, *one of the main things I had a problem with*
16 *was that this is an individual who was a Black man*
17 *with no kids and no family.* He said he was not
18 married. He had no family and in fact he had
19 absolutely no experience whatsoever with police
20 officers. . . . I felt he had an attitude

Constitution forbids striking even a single prospective juror for a discriminatory purpose."); Jones v. Ryan, 987 F.2d 960, 972 (3d Cir. 1993) (holding that "the exclusion of even a single venireperson on the basis of race is a violation of the Equal Protection Clause. This circuit has also held that the exclusion of even one juror on the basis of race may be sufficient to establish a prima facie case.") (internal citation omitted).

1 Thus, "[o]ne of the main" grounds troubling the prosecutor
2 was Mr. Jones's race (seemingly aggravated by his being a
3 bachelor). Some of the other explanations--e.g., that Mr.
4 Jones gave "one word" answers or "had an attitude"--tend to
5 reinforce rather than dispel a race-based motive. The
6 juror's lack of experience with the police would militate in
7 *favor* of keeping him on the panel.

8 The State argues that the prosecutor's statements that
9 Mr. Jones "was Black" and that he had "no family" were
10 merely descriptive. However, the prosecutor's words and
11 phrasing adduce these characteristics as grounds for the
12 peremptory challenge rather than as incidental description
13 or as a predicate for inferring some permissible ground for
14 excusing the juror. The challenge was therefore improper.

15 In view of the prosecutor's comments, the trial court's
16 rejection of Walker's Batson challenge "involved an
17 unreasonable application of, clearly established Federal
18 law, as determined by the Supreme Court of the United
19 States." 28 U.S.C. 2254(d)(1). We therefore reverse the
20 district court's denial of habeas relief and remand to the
21 district court with instructions to grant a writ of habeas
22 corpus directing Walker's release from custody unless Walker

1 is retried in state court within 90 days of the date of the
2 writ.